

David H. Bernstein
(dhbernstein@debevoise.com)
S. Zev Parnass
(szparnass@debevoise.com)
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
(212) 909-6696 (telephone)
(212) 521-7696 (facsimile)

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Attorneys for Plaintiff Energy Brands Inc. d/b/a Glacéau

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | | |
|-----------------------------------|---|--------------------|
| ----- | X | |
| ENERGY BRANDS INC. d/b/a GLACÉAU, | : | |
| | : | |
| Plaintiff, | : | |
| | : | 08 Civ. 4909 (JSR) |
| v. | : | |
| | : | |
| NATIONAL BEVERAGE CORP., | : | |
| | : | |
| Defendant. | : | |
| | : | |
| ----- | X | |

NOTICE OF VOLUNTARY DISMISSAL

WHEREAS, Energy Brands Inc. d/b/a Glacéau (“Glacéau”) commenced the above-entitled action against National Beverage Corp. (“National”) by filing a Complaint on May 28, 2008, alleging, *inter alia*, that the trade dress of National’s ÀSANTÉ product infringes and dilutes the trade dress of Glacéau’s VITAMINWATER® product; and

WHEREAS, on June 2, 2008, Glacéau filed an Amended Complaint in the above-entitled action adding allegations, *inter alia*, that the use of the phrase “VITAMIN

WATER” on the label of National’s ÀSANTÉ product infringes and dilutes the VITAMINWATER® trademark; and

WHEREAS, on June 4, 2008, Glacéau filed a motion to dismiss the declaratory judgment complaint filed by National against Glacéau in the United States District Court for the Southern District of Florida, captioned *National Beverage Corp. v. Energy Brands, Inc. d/b/a Glaceau*, No. 08-60792-CIV-ALTONAGA/BROWN (S.D. Fla.) (the “Florida Action”), or, alternatively, to stay or transfer the Florida Action; and

WHEREAS, on July 9, 2008, at the hearing on Glacéau’s motion to dismiss the Florida Action, National represented to the Court in the Florida Action that it was going to make a change to its ÀSANTÉ trade dress to the trade dress shown in Exhibit A (the “New ÀSANTÉ Trade Dress”); and

WHEREAS, the New ÀSANTÉ Trade Dress does not include the infringing and diluting reference “VITAMIN WATER”; and

WHEREAS, the parties have been engaged in settlement discussions in light of the representations National made on July 9, 2008 concerning the New ÀSANTÉ Trade Dress; and

WHEREAS, on August 14, 2008, the Court in the Florida Action denied Glacéau’s motion;

NOW, THEREFORE, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i), Glacéau hereby issues and files this Notice of Voluntary Dismissal dismissing the above-entitled action without prejudice.

Dated: August 18, 2008
New York, New York

DEBEVOISE & PLIMPTON LLP

By: /s/ David H. Bernstein
David H. Bernstein
(dhbernstein@debevoise.com)
S. Zev Parnass
(szparnass@debevoise.com)
919 Third Avenue
New York, New York 10022
(212) 909-6696 (telephone)
(212) 521-7696 (facsimile)

*Attorneys for Plaintiff Energy Brands Inc.
d/b/a Glacéau*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 18, 2008, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel or parties of record on the below service list.

/s/ David H. Bernstein
David H. Bernstein

Leslie J. Lott, Esq.
Lott & Friedland, P.A.
355 Alhambra Circle
Suite 1100
Coral Gables, Florida 33114
Attorneys for Defendant

EXHIBIT A



REPLENISH
KIWI STRAWBERRY
B VITAMINS + ELECTROLYTES

20 FL OZ (591) mL



REPLENISH
KIWI STRAWBERRY
B VITAMINS + ELECTROLYTES

20 FL OZ (591) mL

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Asante is deliciously flavored water, enhanced with specific nutrients you need to maintain a healthy balance in your body. Proper hydration is so important, and Asante Replenish is a refreshing alternative with the added bonus of 7 essential vitamins and minerals. To Health!

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06-2008-FDC PLB31085



Nutrition Facts

Serving Size 8 fl oz (240 mL)
Servings per Container 2.5

Amount Per Serving

Calories 50

% Daily Value*

Total Fat 0g **0%**

Sodium 0mg **0%**

Total Carbohydrate 13g **4%**

Sugars 13g

Protein 0g

| | per serving | per bottle |
|-------------|-------------|------------|
| Vitamin A | 10% | 25% |
| Vitamin C | 40% | 100% |
| Vitamin E | 10% | 25% |
| Vitamin B3 | 10% | 25% |
| Vitamin B6 | 10% | 25% |
| Vitamin B12 | 10% | 25% |
| Vitamin B5 | 10% | 25% |
| Magnesium | 20mg 5% | 50mg 15% |

Not a significant source of saturated fat, trans fat, cholesterol, dietary fiber, calcium, and iron.

*Percent Daily Values are based on a 2,000 calorie diet.

INGREDIENTS: WATER, CRYSTALLINE FRUCTOSE, NATURAL FLAVOR, CITRIC ACID, MAGNESIUM LACTATE (ELECTROLYTE), CALCIUM LACTATE (ELECTROLYTE), GUAR GUM, ASCORBIC ACID (VITAMIN C), VEGETABLE JUICE (COLOR), MONOPOTASSIUM PHOSPHATE (ELECTROLYTE), VITAMIN A PALMITATE, VITAMIN E ACETATE, NIACIN (B3), PANTOTHENIC ACID (B5), PYRIDOXINE HYDROCHLORIDE (B6), CYANOCOBALAMIN (B12), RED 40.

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